In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1440

LEE V. OLENZ, PETITIONER

v.

A. L. MAROVITZ, UNITED STATES DISTRICT JUDGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is a former employee of Teletype Corporation, one of the named defendants in a complaint filed by petitioner in the United States District Court for the Northern District of Illinois. Petitioner charged that he had been improperly discharged from his employment, allegedly in violation of numerous federal statutes, including the Age Discrimination in Employment Act of 1967—a statute administered by the United States Department of Labor, which was named as a co-defendant (Pet. 2, 4–5).

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After various proceedings were held in the district court, petitioner filed a petition for a writ of mandamus or prohibition in the court of appeals to compel the district court judge to recuse himself. On January 17, 1973, the court of appeals denied the petition for an extraordinary writ, and subsequently denied on the ground of mootness petitioner's motion filed on January 17, 1973, to stay all proceedings in the district court pending "appellate action" on his petition for mandamus and prohibition (Pet. App. I, p. 8). A timely petition for rehearing *en banc* was denied on March 8, 1973 (Pet. 1).

The petition challenges on several grounds the propriety of the denial of petitioner's application for a writ of mandamus or prohibition. The issuance of such writs is discretionary (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 111–112, n. 8), and the record shows that the court of appeals did not abuse its discretion in denying such extraordinary relief here. Petitioner's affidavit of disqualification contains allegations essentially similar to those set forth in the petition and attached chronology. These allegations (concerning, *e.g.*, comments by the trial judge about *pro se* cases, the propriety of the trial judge's action in placing documents in the court file which had been entrusted to him personally by the petitioner, and certain statements made by the district court clerk as to the location and timeliness of various court documents) do not provide a reasonable basis for petitioner's allegation of personal bias and prejudice on the part of the trial judge. In these circumstances, the trial judge

was fully justified in denying petitioner's disqualification motion. It follows *a fortiori* that the court of appeals properly denied his petition for a writ of mandamus.[1] See, *e.g.*, *United States* v. *Avila*, 443 F.2d 792, 794–795 (C.A. 5); *United States* v. *Anderson*, 433 F.2d 856, 860–861 (C.A. 8); *Hodgson* v. *Liquor Salesmen's U. Loc. No. 2 of State of N.Y.*, 444 F.2d 1344 (C.A. 2); *Tynan* v. *United States*, 376 F.2d 761 (C.A.D.C.), certiorari denied, 389 U.S. 845.

Moreover, on March 29, 1973 and May 25, 1973, the district court entered orders dismissing the complaint against the Department of Labor and the five defendant corporations, and petitioner will now be free to raise the claims asserted here on a direct appeal to the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

[1] The extraordinary writs are "appropriately issued [only] * * * when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder*, *supra*, 379 U.S. at 110. The writs are not available when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States*, 351 U.S. 513, 520.

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